

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

EZRA L. BEDESKI.

Plaintiff,

V.

MICHAEL J. ASTRUE,
Commissioner of Social Security,
Defendant.

NO. CV-11-118-RHW

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT; GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Before the Court are Plaintiff's Motion for Summary Judgment, ECF No. 14 and Defendant's Motion for Summary Judgment, ECF No. 16. The motions were heard without oral argument. Plaintiff is represented by Maureen Rosette. Defendant is represented by Assistant United States Attorney Pamela De Rusha and Special Assistant United States Attorney Jeffrey McClain.

I. Jurisdiction

On February 11, 2009, Plaintiff Ezra L Bedeski filed an application for Supplemental Social Security Income (SSI) and Social Security Disability Insurance Benefits (SSDIB). Plaintiff alleges that he has been disabled since January 1, 2007.

His application was denied initially on March 27, 2009, and again denied on reconsideration on May 1, 2009. A timely request for a hearing was made. On November 10, 2009, Plaintiff appeared in Spokane, Washington before Administrative Law Judge (ALJ) Marie Palachuk. Sharon Welter, vocational expert, also appeared at the hearing. Plaintiff was represented by attorney Dana C.

1 Madsen.

2 The ALJ found that Plaintiff was not disabled from January 1, 2007 through
 3 December 4, 2009. Plaintiff timely requested review by the Appeals Council,
 4 which was denied March 16, 2011. The Appeals Council's denial of review makes
 5 the ALJ's decision the final decision of the Commissioner. (42 U.S.C. §405(h)).
 6 Plaintiff filed an appeal with the U.S. District Court for the Eastern District of
 7 Washington on March 29, 2011. The instant matter is before the district court
 8 pursuant to 42 U.S.C. § 405(g).

9 **II. Sequential Evaluation Process**

10 The Social Security Act defines disability as the "inability to engage in any
 11 substantial gainful activity by reason of any medically determinable physical or
 12 mental impairment which can be expected to result in death or which has lasted or
 13 can be expected to last for a continuous period of not less than twelve months."
 14 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). A claimant shall be determined to be
 15 under a disability only if his impairments are of such severity that the claimant is
 16 not only unable to do his previous work, but cannot, considering claimant's age,
 17 education and work experiences, engage in any other substantial gainful work
 18 which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

19 The Commissioner has established a five-step sequential evaluation process
 20 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a)(4),
 21 416.920; *Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987).

22 Step 1: Is the claimant engaged in substantial gainful activities? 20 C.F.R.
 23 §§ 404.1520(b), 416.920(b). Substantial gainful activity is work done for pay and
 24 requires compensation above the statutory minimum. 20 C.F.R. §§ 404.1574,
 25 416.972; *Keyes v. Sullivan*, 894 F.2d 1053, 1057 (9th Cir. 1990). If the claimant is
 26 engaged in substantial activity, benefits are denied. 20 C.F.R. §§ 404.1571,
 27 416.920(b). If he is not, the ALJ proceeds to step two.

28 Step 2: Does the claimant have a medically-severe impairment or

1 combination of impairments? 20 C.F.R. §§ 404.1520(c), 416.920(c). If the
 2 claimant does not have a severe impairment or combination of impairments, the
 3 disability claim is denied. A severe impairment is one that lasted or must be
 4 expected to last for at least 12 months and must be proven through objective
 5 medical evidence. 20 C.F.R. §§ 404.1508-09, 416.908-09. If the impairment is
 6 severe, the evaluation proceeds to the third step.

7 Step 3: Does the claimant's impairment meet or equal one of the listed
 8 impairments acknowledged by the Commissioner to be so severe as to preclude
 9 substantial gainful activity? 20 C.F.R. §§ 404.1520(d), 416.920(d); 20 C.F.R.
 10 § 404 Subpt. P. App. 1. If the impairment meets or equals one of the listed
 11 impairments, the claimant is conclusively presumed to be disabled. *Id.* If the
 12 impairment is not one conclusively presumed to be disabling, the evaluation
 13 proceeds to the fourth step.

14 Step 4: Does the impairment prevent the claimant from performing work he
 15 has performed in the past? 20 C.F.R. §§ 404.1520(e), 416.920(e). If the claimant
 16 is able to perform his previous work, he is not disabled. *Id.* If the claimant cannot
 17 perform this work, the ALJ proceeds to the fifth and final step.

18 Step 5: Is the claimant able to perform other work in the national economy
 19 in view of his age, education, and work experience? 20 C.F.R. §§ 404.1520(f),
 20 416.920(f).

21 The initial burden of proof rests upon the claimant to establish a *prima facie*
 22 case of entitlement to disability benefits. *Tackett v. Apfel*, 108 F.3d 1094, 1098
 23 (9th Cir. 1999). This burden is met once a claimant establishes that a physical or
 24 mental impairment prevents him from engaging in his previous occupation. *Id.* At
 25 step five, the burden shifts to the Commissioner to show that the claimant can
 26 perform other substantial gainful activity. *Id.*

27 **III. Standard of Review**

28 The Commissioner's determination will be set aside only when the ALJ's

1 findings are based on legal error or are not supported by substantial evidence in
 2 the record as a whole. *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir. 1992)
 3 (citing 42 .S.C. § 405(g)). Substantial evidence is “more than a mere scintilla,”
 4 *Richardson v. Perales*, 402 U.S. 389, 401 (1971), but “less than a preponderance.”
 5 *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n. 10 (9th Cir. 1975). Substantial
 6 evidence is “such relevant evidence as a reasonable mind might accept as adequate
 7 to support a conclusion.” *Richardson*, 402 U.S. at 401. The Court must uphold the
 8 ALJ’s denial of benefits if the evidence is susceptible to more than one rational
 9 interpretation, one of which supports the decision of the administrative law judge.
 10 *Batson v. Barnhart*, 359 F.3d 1190, 1193 (9th Cir. 2004). “If the evidence can
 11 support either outcome, the court may not substitute its judgment for that of the
 12 ALJ.” *Matney*, 981 F.2d at 1019.

13 A decision supported by substantial evidence will be set aside if the proper
 14 legal standards were not applied in weighing the evidence and making the
 15 decision. *Brawner v. Secretary of Health & Human Servs.*, 839 F.2d 432, 433 (9th
 16 Cir. 1988). An ALJ is allowed “inconsequential” errors as long as they are
 17 immaterial to the ultimate non-disability determination. *Stout v. Comm'r, Soc. Sec.
 18 Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006).

19 **IV. Statement of Facts**

20 The facts have been presented in the administrative transcript and the ALJ’s
 21 decision and will only be summarized here.

22 At the time of the hearing, Plaintiff was thirty-four years old. He graduated
 23 from high school, but received special education in reading, math and spelling. He
 24 attended community college for one and a half years, studying culinary arts. He
 25 did not receive his degree. He has worked in the restaurant industry and at fast
 26 food establishments, as well as has worked as a telemarketer and janitor. Plaintiff
 27 generally worked at his place of employment for a couple of months at a time;
 28 however, there were a few places where he worked significantly longer. It does not

1 appear that he gets fired from his jobs; rather he quits. He told Dr. Severinghouse
2 that he quit his last job because he didn't feel like he belonged, people were
3 talking behind his back, and he was not getting the hours he wanted. (Tr. 227.)

4 At the hearing, Plaintiff testified he quit work in 2008 because he began
5 experiencing tremors, in which his hands and legs begin to shake. He also blacks
6 out during the episodes. After these episodes, things are hazy and it takes about a
7 half hour to about an hour to get control back to his body. He testified that the
8 tremors occur about two or three times a month and some of them lead into
9 seizures.

10 Plaintiff testified that his roommate has told him that his seizures last
11 between five to fifteen minutes. Afterward, Plaintiff feels like a Mack truck hit
12 him. His body is sore and he can barely move. He stated that this feeling lasted
13 about an hour. He testified that the seizures happen about three to four times a
14 month.

15 Plaintiff is taking medication for the seizures and tremors, and he reported
16 that they are helping, but he still has one or two seizures. He also has trouble
17 sleeping because of his hip, back, and leg pain. He attributed his headaches, which
18 he reported occurring three to four times a month and lasting 15 to 20 minutes, to
19 his back pain.

20 Plaintiff reported that he spends most of his days laying down or sitting
21 down because of his pain. He doesn't vacuum, sweep, mop or do the laundry. He
22 reports that he does the dishes. He testified that he used to do marijuana in high
23 school, but he quit when he was in the 12th or 13th grade.

24 **V. The ALJ's findings**

25 The ALJ found that Plaintiff met the insured status requirement through
26 March 31, 2011.

27 At step one, the ALJ found that Plaintiff has not engaged in substantial

1 gainful activity since January 1, 2007. (Tr. 55.) She noted that although Plaintiff
 2 earned money in 2007 and 2008 working as a cook, cook helper, and kitchen
 3 helper, the monetary amounts earned by the work were presumptively not
 4 substantial gainful activity. (Tr. 55.)

5 At step two, the ALJ found Plaintiff has the following severe impairments:
 6 seizure disorder and mild learning disorder. (Tr. 55.) The ALJ concluded that
 7 Plaintiff's history of kidney stones and lumbar back pain were not severe
 8 impairments as they imposed no more than a minimal or *de minimis* limitation
 9 upon Plaintiff's ability to do work-related activities. (Tr. 55.)

10 At step three, the ALJ found that Plaintiff did not have an impairment or
 11 combination of impairments that meets or medically equals one of the listed
 12 impairments. (Tr. 60.) She found that neither "paragraph B" criteria or "paragraph
 13 C" criteria was not satisfied, but noted that Plaintiff has the following limitations:
 14 mild restriction of activities of daily living; mild difficulties in maintaining social
 15 function; mild difficulties in maintaining concentration, persistence or pace; and
 16 no episodes of decompensation. (Tr. 60-61.)

17 At step four, the ALJ found that Plaintiff has the residual functional
 18 capacity to perform a full range of work at all exertional levels but with the
 19 following non-exertional limitations: needing additional time to learn new tasks
 20 due to his slight learning disability.¹ (Tr. 61.) She concluded that telephone work
 21 would be difficult due to his slight speech impediment, and he should avoid
 22 concentrated exposure to hazards, such as machinery and heights, and he should
 23 not drive. (Tr. 61.) She concluded that Plaintiff could return to past relevant work

24
 25 ¹The ALJ posed the following hypothetical to the vocational expert: this
 26 individual has no exertional limitations and no specific mental limitations, except
 27 that the individual would need additional time to learn tasks and has a speech
 28 impediment that would make consistent telephone work difficult. (Tr. 46.)

1 as a short-order cook, fast-food cook, kitchen helper, cook helper, and janitor. (Tr.
 2 63.)

3 **VI. Issues for Review**

4 Plaintiff presents the following issues with respect to the ALJ's findings:

5 1. Whether there is substantial evidence to support the ALJ's conclusion
 6 that Plaintiff is not disabled;

7 2. Whether the ALJ properly considered the opinions of treating and
 8 examining sources in evaluating Plaintiff's psychological impairment;

9 3. Whether the ALJ properly found that Plaintiff's testimony was not
 10 credible;

11 4. Whether the ALJ properly evaluated the lay witness testimony.

12 **VII. Discussion**

13 Plaintiff asserts that he is more limited from a physical and psychological
 14 standpoint that reflected in the ALJ's decision. Plaintiff argues that Dr. Mabee
 15 assessed his ability to do work activities, and concluded she would have moderate
 16 limitations in the ability to exercise judgment and make decisions; perform routine
 17 tasks, respond appropriately to and tolerate the pressures and expectations of a
 18 normal work setting; care for self, including personal hygiene and appearance,
 19 controlling physical or motor movements, and maintaining appropriate behavior,
 20 and determined that Plaintiff would have marked limitation in the ability to relate
 21 appropriately to coworkers and supervisors.

22 Dr. Mabee, in conjunction with Ms. Jamieson-Turner, opined that these
 23 limitations were expected to last a maximum of six months. (Tr. 250) Both
 24 suggested counseling for Plaintiff. (Tr. 260.) There is nothing in the record to
 25 suggest that Plaintiff engaged in ongoing mental health treatment. Moreover, he is
 26 not on medication for any psychological condition.

27 An alleged medically determinable impairment must result from anatomical,
 28

1 physiological, or psychological abnormalities that can be shown by medically
 2 acceptable clinical and laboratory diagnostic techniques. 42 U.S.C. § 423(d)(3). It
 3 cannot be established only by a claimant's statements regarding his symptoms. 20
 4 C.F.R. §§ 404.1508, 416.908. Additionally, the impairment must last or be
 5 expected to last for at least 12 months. 20 C.F.R. §§ 404.1508-09, 416.908-09.

6 Plaintiff has not met his burden of showing that he has a medically
 7 determinable mental impairment that meets the statutory definition besides his
 8 mild learning disorder. Additionally, the record does not support the existence of a
 9 medically determinable mental impairment other than Plaintiff's mild learning
 10 disorder.

11 Plaintiff also argues that the ALJ did not properly consider his symptom
 12 testimony or it was not properly rejected.

13 An ALJ's assessment of a claimant's credibility is entitled to "great weight."
 14 *Anderson v. Sullivan*, 914 F.2d 1121, 1124 (9th Cir.1990). When there is no
 15 evidence of malingering, the ALJ must give "specific, clear and convincing
 16 reasons" for rejecting a claimant's subjective symptom testimony. *Molina v.*
 17 *Astrue*, 674 F.3d 1104, 1112 (9th Cir. 2012) (citation omitted); *accord Taylor v.*
 18 *Comm'r of Soc. Sec. Admin.*, 659 F.3d 1228, 1234 (9th Cir. 2011) (citing
 19 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007)). If the ALJ's
 20 credibility finding is supported by substantial evidence in the record, the
 21 reviewing court "may not engage in second-guessing." *Thomas v. Barnhart*, 278
 22 F.3d 947, 959 (9th Cir. 2002).

23 In recognition of the fact that an individual's symptoms can sometimes
 24 suggest a greater level of severity of impairment than can be shown by the
 25 objective medical evidence alone, 20 CFR 404.1529(c) and 416.929(c) describe
 26 the kinds of evidence, including the factors below, that the ALJ must consider in
 27 addition to the objective medical evidence when assessing the credibility of an
 28 individual's statements:

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1 1. The individual's daily activities; 2. The location, duration,
 2 frequency, and intensity of the individual's pain or other symptoms;
 3 3. Factors that precipitate and aggravate the symptoms; 4. The type,
 4 dosage, effectiveness, and side effects of any medication the
 5 individual takes or has taken to alleviate pain or other symptoms; 5.
 6 Treatment, other than medication, the individual receives or has
 7 received for relief of pain or other symptoms; 6. Any measures other
 8 than treatment the individual uses or has used to relieve pain or other
 9 symptoms (e.g., lying flat on his or her back, standing for 15 to 20
 10 minutes every hour, or sleeping on a board); and 7. Any other factors
 11 concerning the individual's functional limitations and restrictions due
 12 to pain or other symptoms.

7 SSR 96-7P, 1996 WL 374186.

8 Plaintiff focuses on his testimony regarding his seizures. He maintains the
 9 ALJ did not state specifically why his testimony regarding the frequency of his
 10 petite mal seizures and the frequency of his grand mal seizures were not credible
 11 and what facts in the record led to that conclusion. At the hearing, his counsel
 12 added to the hypothetical posed by the ALJ the following conditions: that the
 13 individual has a seizure disorder and the petite mals occur two to three times per
 14 month and last two to three minutes, and then for a half an hour after that the
 15 individual feels really poor and can't really do anything, and also had three to four
 16 grand mal type seizures per month, and after these, the individual feels poor for
 17 about an hour; the seizures occur unpredictably and can occur at any time. (Tr.
 18 47.) The vocational expert responded that such an individual would not be able to
 19 maintain competitive employment. (Tr. 47.)

20 Here, the ALJ set forth clear and convincing reasons for his adverse
 21 credibility findings. He noted the inconsistent statements in the medical records
 22 when compared to his testimony at the hearing. (Tr. 62.) For instance, he noted
 23 that Plaintiff's testimony regarding the severity and frequency of his seizures were
 24 completely at odds with what he told Dr. Powell, his reported activities of daily
 25 living to Dr. Severinghaus and Dr. Mabee was inconsistent with his testimony at
 26 the hearing, his EEG was normal, and it appeared that Dr. Powell was not
 27 convinced that he had a seizure disorder, but put him on medications simply as a
 28 precautionary measure. (Tr. 62.) Plaintiff testified he has five to fifteen minute

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1 seizures, which occur three to four times a month, yet he told Dr. Powell that he
 2 had three seizures over the last six years and two seizures in the last 2 years.

3 Moreover, the ALJ concluded that his report of his drug use was
 4 inconsistent. He testified that he used illegal drugs in high school, but reported to
 5 Dr. Powell that he smokes marijuana once a month. Additionally, in March, 2009
 6 he told Dr. Severinghaus that he had occasional lower back pain, reported that he
 7 could clean his house, including doing laundry and denied needing any physical
 8 assistance.

9 The ALJ also relied on objective evidence of symptom exaggeration.
 10 Notably, Plaintiff's MMPI-2 test result was invalid due to possible exaggeration,
 11 over reporting of symptoms, serious psychological or emotional problems, or may
 12 wish to give that impression. Also, Plaintiff consistently told his treatment
 13 providers that he was bipolar and had attention deficit hyperactivity disorder, but
 14 as the ALJ pointed out, there was no basis in the treatment notes to support either
 15 diagnosis. Ms. Jamieson-Turner indicated that there was insufficient evidence to
 16 suggest that Plaintiff has bipolar disorder. (Tr. 260.)

17 Plaintiff has not shown that the ALJ committed legal error in finding that
 18 his testimony regarding the frequency and description of his seizures was not
 19 credible. Moreover, the ALJ's credibility findings are supported by the record.²

20 Finally, Plaintiff argues the ALJ improperly rejected a letter written by his

22 ²On December 23, 2009, Dr. Powell made the following notation:

23 Ezra presents for followup evaluation. He states that he is having
 24 several episodes of tremors. He demonstrates this for me today. It
 25 appears to be simply related to anxiety. Both hand are shaking in a
 26 rotary type fashion. There is no loss of awareness. It does not
 27 involved other parts of his body. He states he could have had a couple
 28 of other seizures. He brings some letters from his friends who say that
 they are seeing seizure activity. I am near certain that it is not an
 epileptic phenomenon. He is going through the process of trying to
 maintain his disability. All this activity increased during that time. I
 am convinced that it is likely psychogenic.

(Tr. 356.)

1 roommate, in which he stated that he had been Plaintiff's roommate for three years
 2 and friend for 13 years.³ He reported he had witnessed Plaintiff experiencing
 3 seizures anywhere from five to six times a month and after he took his medication,
 4 he would have two to three seizures. The ALJ did not refer to this letter in his
 5 Order.

6 Defendant argues that while the exclusion of the letter was legal error, the
 7 error was harmless in this case because the ALJ would not have reached a
 8 different conclusion even if he fully credited the lay witness statement. *See Stout*
 9 *v. Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050, 1056 (9th Cir. 2005). In that case, the
 10 Ninth Circuit instructed that where the ALJ erred in failing to properly discuss
 11 competent lay testimony favorable to the claimant, a reviewing court cannot
 12 consider the error harmless unless it can confidently conclude that no reasonable
 13 ALJ, when fully crediting the testimony, could have reached a different disability
 14 determination.

15 Here, even if the ALJ fully credited Mr. Collins' lay testimony, no
 16 reasonable ALJ would have concluded that Plaintiff was disabled because of his
 17 seizure disorder. The letter does not offer any discussion of specific functional
 18 limitations that could be used in making a residual functional capacity. Nor does it
 19 provide insight into the number and duration of the seizures post-medication. If
 20 anything, it supports a conclusion that Plaintiff has experienced a drastic reduction
 21 in his seizure symptoms, which would support the ALJ's residual functional

22

23

24

³The letter contained the following:

To Whom it may concern,

I Lee W. Collins am a witness to Ezra Bedeski taking Lamotrigue and since start this medication he has had several seizures and he and been my roommate 3 years and friend for 13 years. He's had this happen to 5 or 6 times a month befor [sic] starting his medication. It has slowed down a lot since starting I've only seen him have 2 or 3 since starting the new med.

(Tr. 215.)

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1 capacity.⁴

2 Plaintiff has not met his burden of showing that the ALJ committed legal
 3 error, or that her conclusion that Plaintiff was not disabled from January 1, 2007 to
 4 December 4, 2009 was not supported by substantial evidence.

5 Accordingly, **IT IS HEREBY ORDERED:**

6 1. Plaintiff's Motion for Summary Judgment, ECF No. 14, is **DENIED**.

7 2. Defendant's Motion for Summary Judgment, ECF No. 16, is

8 **GRANTED**.

9 3. The decision of the Commissioner denying benefits is affirmed.

10 4. The District Court Executive is directed to enter judgment in favor of
 11 Defendant and against Plaintiff.

12 **IT IS SO ORDERED.** The District Court Executive is hereby directed to
 13 file this Order and provide copies to counsel, and **close the file**.

14 **DATED** this 25th day of February, 2012.

15 *s/Robert H. Whaley*
 16 ROBERT H. WHALEY
 17 United States District Judge

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26 ⁴This conclusion is supported by Plaintiff's self-reporting in his September,
 27 2009 follow-up appointment to his July, 2009 appointment that he had no more
 28 episodes. (Tr. 338.)